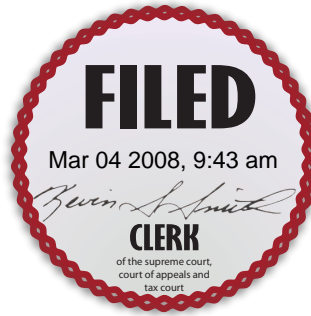


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE  
COURT OF APPEALS OF INDIANA**

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ELLIOTT CUNNINGHAM,  
  
Appellant-Defendant,

vs.

STATE OF INDIANA,  
  
Appellee-Plaintiff.

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No. 45A03-0705-CV-210

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APPEAL FROM THE LAKE SUPERIOR COURT  
CRIMINAL DIVISION, ROOM 6  
The Honorable John R. Pera, Special Judge  
Cause No. 45D10-0604-IF-1

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**March 4, 2008**

**MEMORANDUM DECISION – NOT FOR PUBLICATION**

**RILEY, Judge**

## STATEMENT OF THE CASE

Appellant-Defendant, Elliott Cunningham (Cunningham), appeals following a jury verdict against him in a trial arising from a speeding ticket.

We affirm.

## ISSUES

Cunningham raises four issues on appeal, which we restate and reorder as:

- (1) Whether the trial court violated his Fifth Amendment privilege against self-incrimination when it ordered him to submit to a deposition;
- (2) Whether the trial court erred by ordering him to submit to a deposition after the discovery deadline;
- (3) Whether the trial court abused its discretion in denying Cunningham's motion for mistrial based on alleged prosecutorial misconduct; and
- (4) Whether the trial court violated Indiana Trial Rule 45(B) by granting the State's Motion to Limit the Scope of Discovery and for Protective Order.

## FACTS AND PROCEDURAL HISTORY

On October 26, 2004, Detective Robert Bridgeman of the Lake County Sheriff's Department (Detective Bridgeman)<sup>1</sup> observed a vehicle driving in excess of the speed limit. Detective Bridgeman stopped the vehicle and issued the driver, Cunningham, a speeding

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<sup>1</sup> Bridgeman was a deputy sheriff in 2004; he became a detective in approximately 2006.

ticket. On December 7, 2004, Cunningham appeared for a bench trial in the matter and requested a jury trial. The trial court denied his request and, on December 13, 2004, entered a decision in favor of the State and ordered Cunningham to pay fines and court costs in the amount of \$96.50. Cunningham appealed, claiming that drivers accused of traffic infractions are entitled to a jury trial. On October 25, 2005, we issued an opinion agreeing with Cunningham and remanding for further proceedings. *Cunningham v. State*, 835 N.E.2d 1075 (Ind. Ct. App. 2005), *trans. denied*.

On November 9, 2006, the trial court issued an Order on Proceedings that provided, “All discovery in this case shall be completed by February 2, 2007.” (Appellant’s App. p. 6). On November 21, 2006, Cunningham filed a subpoena *duces tecum* for the deposition of Deputy Commander William Paterson of the Lake County Sheriff’s Department, requesting the production of: (1) maintenance records for the radar device used during Cunningham’s traffic stop; (2) Detective Bridgeman’s training records; (3) the radar device itself; (4) records of Detective Bridgeman’s job evaluations and disciplinary actions; (5) all documentation and records of Detective Bridgeman’s traffic stops on October 26, 2004; (6) records relating to the chain of custody of the radar device; and (7) the operational and training manual for the radar device. On December 8, 2006, the State filed its Motion to Limit the Scope of Discovery and for Protective Order, asking that it not be required to provide items 2, 3, 4, 5, or 7. On January 3, 2007, the trial court granted the State’s motion.

On February 14, 2007, the State filed a notice of intent to take Cunningham’s deposition. Cunningham objected based upon the Fifth Amendment to the United States

Constitution and the fact that the February 2nd discovery deadline had passed. On March 7, 2007, the trial court held a hearing, overruled Cunningham's objections, and ordered him to submit to a deposition after the hearing.

A jury trial was held on March 15, 2007. The State called Detective Bridgeman, and during cross-examination, Cunningham asked Detective Bridgeman whether he remembered "the earlier trial." (Tr. p. 94). Cunningham then stated, "In fact, we went to trial a month after you gave me the ticket." (Tr. p. 95). During re-direct examination, the prosecutor asked Detective Bridgeman, "Do you have a recollection as to what the outcome of that prior case was?" (Tr. p. 139). Detective Bridgeman responded, "Guilty." (Tr. p. 139). On re-cross examination, Cunningham asked Detective Bridgeman whether he understood that the original decision had been overturned by this court. Detective Bridgeman responded, "Yes, that's why we're here today, sir." (Tr. p. 144). Finally, on re-re-direct examination, the prosecutor asked Detective Bridgeman whether he knew the basis of the reversal, and Detective Bridgeman explained, "The only reason the case was reversed is because Mr. Cunningham was denied jury trial." (Tr. p. 145).

After the trial adjourned for lunch, the trial court raised the issue of the first trial with the parties. Cunningham moved for a mistrial. The trial court judge said that he would declare a mistrial if the jurors could not assure him that they would disregard the testimony regarding the first trial. He also admonished the prosecutor to "err on the side of caution" for the remainder of the trial. (Tr. p. 152). When the jurors returned from lunch, the trial court admonished them to disregard any evidence relating to the first trial, and each of the jurors

agreed to do so. The jury entered a verdict against Cunningham and imposed a civil penalty of \$225.

Cunningham now appeals. Additional facts will be provided as necessary.

### DISCUSSION AND DECISION

On appeal, Cunningham argues that: (1) the trial court violated his Fifth Amendment privilege against self-incrimination when it ordered him to submit to a deposition; (2) the trial court erred by ordering him to submit to a deposition after the discovery deadline; (3) the trial court abused its discretion in denying his motion for mistrial based on alleged prosecutorial misconduct; and (4) the trial court violated Indiana Trial Rule 45(B) by granting the State's Motion to Limit the Scope of Discovery and for Protective Order.<sup>2</sup>

#### *I. Self-Incrimination*

Cunningham first contends that the trial court violated his privilege against self-incrimination under the Fifth Amendment to the United States Constitution when it ordered

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<sup>2</sup> On the final page of his brief, Cunningham includes a "Notification of 5<sup>th</sup> Amendment to the U.S. Constitution," which states:

Defendant contends that the Trial Court is mandated to give Defendant the following rights before Trial. 1. The right to exercise his 5<sup>th</sup> Amendment to the U.S. Constitution right against self-incrimination. 2. The right to an appeal. 3. The right to an attorney and if the Defendant cannot afford an attorney then one will be appointed at no cost.

(Appellant's Br. p. 16). This "issue" does not appear in Cunningham's Statement of the Issues or his Summary of Argument, and we, like the State, are "at a loss to decipher what exactly [Cunningham's] claim is regarding those rights." (Appellee's Br. p. 15). To the extent that Cunningham seeks to raise additional issues with regard to his constitutional rights, he has waived them by failing to provide any cogent argument or citations to relevant authorities or the record on appeal. *See* Ind. Appellate Rule 46(A)(8)(a).

him to submit to a deposition. The Fifth Amendment provides, in pertinent part, that no person “shall be compelled in any criminal case to be a witness against himself[.]” Under this provision, a witness is excused from answering a question, even in a non-criminal proceeding, “if the answer would tend to furnish one link in the chain of evidence necessary to convict him of a criminal charge.” *In re Kefalidis*, 714 N.E.2d 243, 245 (Ind. Ct. App. 1999). Here, Cunningham has failed to direct us to *any* question he was forced to answer over a Fifth Amendment objection, let alone any questions that could lead to a criminal prosecution. Therefore, we conclude that the trial court did not err in ordering Cunningham to submit to a deposition.

## II. *Deposition after Discovery Deadline*

In addition to his Fifth Amendment claim, Cunningham also argues that the trial court erred by ordering him to submit to the deposition after the February 2nd, 2007, discovery deadline established in the court’s Order on Proceedings of November 9, 2006. While we acknowledge that Cunningham’s deposition took place after the discovery deadline originally imposed by the trial court, we also note that “[t]rial courts are given wide discretion in discovery matters because they have the duty to promote the discovery of truth and to guide and control the proceedings.” *Dye v. State*, 717 N.E.2d 5, 11 (Ind. 1999), *reh’g denied, cert. denied* 531 U.S. 957 (2000). This necessarily includes the discretion to adjust deadlines or to make exceptions to deadlines. Here, the trial court exercised its discretion in allowing the deposition after the discovery deadline, and Cunningham does not explain how that decision constitutes an abuse of discretion. Furthermore, “[t]o obtain reversal of a trial court’s

discovery order, the moving party must show prejudice.” *Lucas v. Dorsey Corp.*, 609 N.E.2d 1191, 1195 (Ind. Ct. App. 1993), *trans. denied*. Cunningham fails to allege how he was prejudiced by the trial court’s decision. He has not persuaded us that the trial court committed reversible error by ordering him to submit to a deposition after the February 2nd, 2007, discovery deadline.

### III. Prosecutorial Misconduct

Cunningham asserts that the trial court abused its discretion in denying his motion for mistrial based on alleged misconduct by the prosecutor. We review such decisions under the deferential abuse of discretion standard because the trial court is in the best position to evaluate the relevant circumstances of an event and its impact on the jury. *Agilera v. State*, 862 N.E.2d 298, 307 (Ind. Ct. App. 2007), *trans. denied*. Cunningham’s claim focuses on the fact that the prosecutor’s line of questioning revealed to the jury that the trial court had entered judgment against Cunningham in the original trial in this cause. However, after the references to the original trial, the trial court admonished the prosecutor to err on the side of caution for the remainder of the trial and admonished the jurors to disregard any evidence relating to the first trial. Each of the jurors agreed to do so. A timely and accurate admonition to the prosecutor and the jury is presumed to cure any prosecutorial misconduct. *See Gamble v. State*, 831 N.E.2d 178, 184 (Ind. Ct. App. 2005), *trans. denied*. In his appeal, Cunningham has presented no argument that the trial court’s admonition was insufficient to cure the alleged misconduct. As such, we cannot say that the trial court abused its discretion in denying Cunningham’s motion for mistrial.

#### IV. *Indiana Trial Rule 45(B)*

Finally, Cunningham contends that the trial court “made error in refusing to enforce Indiana Trial Rule 45(B).” (Appellant’s Br. p. 7). Cunningham is apparently challenging the trial court’s grant of the State’s Motion to Limit the Scope of Discovery and for Protective Order, in which the State objected to Cunningham’s request for the production of the radar device from Detective Bridgeman’s car and certain documents relating to Detective Bridgeman’s employment with the sheriff’s department.

Indiana Trial Rule 45(B) allows a party filing a subpoena to request the production of “the books, papers, documents, or tangible things” designated in the subpoena. Subsection (B)(1) allows a court to “quash or modify the subpoena if it is unreasonable and oppressive[.]” The trial court did so in this case. On appeal, as the State notes, Cunningham baldly asserts, without any analysis or citation to authority, that the requested materials “were discoverable and a matter of public record.” (Appellee’s Br. p. 14). Because Cunningham has failed to provide a cogent argument in this regard, he has waived the issue. *See* Ind. Appellate Rule 46(A)(8)(a).

#### CONCLUSION

Based on the foregoing, we conclude that the trial court did not violate Cunningham’s Fifth Amendment privilege against self-incrimination by ordering him to submit to a deposition; that the trial court did not commit reversible error by ordering Cunningham to submit to a deposition after the discovery deadline; that the trial court did not abuse its discretion in denying Cunningham’s motion for mistrial based on alleged prosecutorial



misconduct; and that the trial court did not violate Indiana Trial Rule 45(B) by granting the State's Motion to Limit the Scope of Discovery and for Protective Order.

Affirmed.

KIRSCH, J., and MAY, J., concur.